

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-2177 T-3839

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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. T-3839

In the Matter

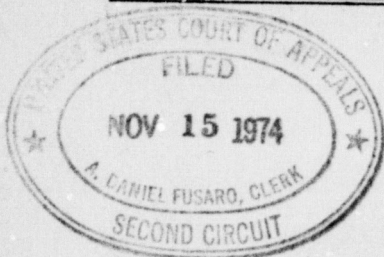
of

KINGSBORO MORTGAGE CORPORATION,

Bankrupt.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF APPELLANTS
MANUFACTURERS HANOVER TRUST COMPANY and
HOWARD F. SUNSHINE, TRUSTEE IN BANKRUPTCY**



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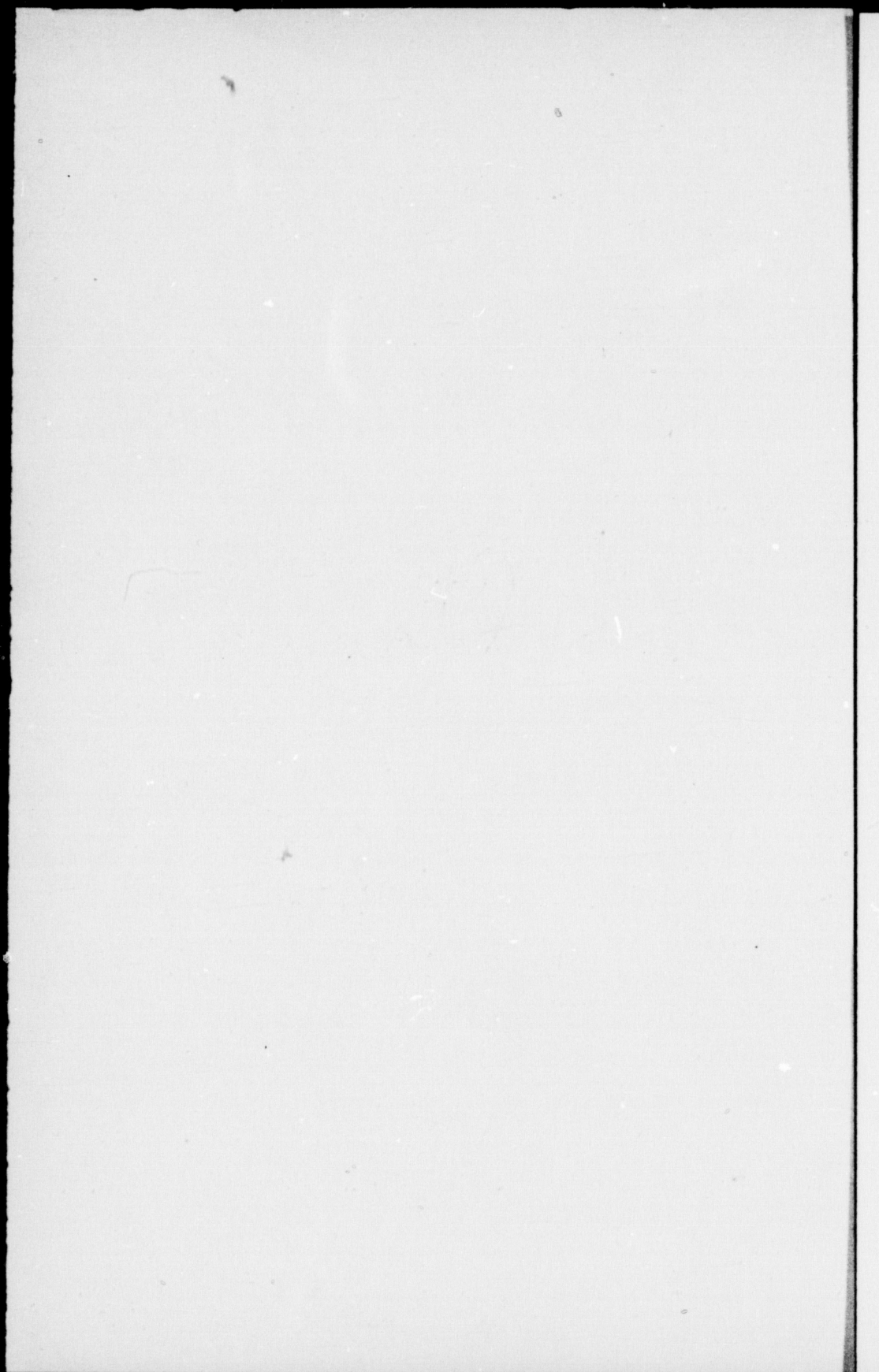


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Statement of Issues

1. Does Section 63a(1) of the Bankruptcy Act, 11 U.S.C. 103a(11) which provides that interest on claims filed against the estate shall cease as of the date of the filing of the petition, apply to the claims of senior creditors to dividends payable to a junior creditor pursuant to the terms of a subordination agreement which provides that in the event of bankruptcy "all principal and interest on all Senior Debt shall first be paid in full before any payment on account of principal and interest is made upon the subordinated claim and that amounts payable to the junior creditors shall be paid directly to the senior creditors" for application in payment of the Senior Debt "unless and until all principal and interest on all Senior Debt shall have been paid in full".

2. Was the District Court's decision and order erroneous in holding that in the light of the provisions of Section 63a(1) of the Bankruptcy Act and the general rule regarding post-bankruptcy interest, the senior creditors were not entitled to claim dividends payable to the junior creditors for application to interest on the Senior Debt, which accrued after the filing of the bankruptcy petition, in absence of an explicit provision in the subordination agreement providing that the senior creditors shall have the right to receive the junior creditor's dividends for application to post-bankruptcy interest, and that the aforementioned language of the subordination agreement should not be given "its obvious construction and effect".

Statement of Case

This is an appeal from the decision and order of the United States District Court for the Southern District of New York (Cannella D.J.) (67a)*, reversing the decision (57a) and order of the Bankruptcy Court (Ryan B.J.) (64a), which directed that the dividends allocable to Bankers Life Company (hereinafter referred to as "Bankers Life") shall be paid to Manufacturers Hanover Trust Company (hereinafter referred to as "Manufacturers") as well as Northwestern Life Insurance Company and Farm Bureau Life Insurance Company (hereinafter collectively referred to as the "Senior Creditors") pursuant to the terms of an agreement wherein Bankers Life as holder of subordinated notes (hereinafter referred to as "Notes") agreed that "all principal and interest on all Senior Debt shall first be paid in full * * * before any payment on account of principal and interest is made upon the Notes" and that in a bankruptcy proceeding any dividends "which may be payable in respect of the Notes shall be paid * * * directly to

* A number followed by "a" denotes the page of the appendix.

the holder of Senior Debt for application in payment thereof, unless and until all principal and interest on all Senior Debt shall have been paid in full". (17a-18a)

The underlying facts are set forth in the decision of the Bankruptcy Court (58a-60a) as well as in a decision of the District Court. (67a-68a) Briefly stated, Bankers Life filed a claim in this proceeding based on Notes held by it issued pursuant to a Purchase Agreement. (6a) The Notes provide that payment thereon is subordinated to Senior Debt to the extent provided in the Purchase Agreement and that by accepting the Notes the holder agrees to such subordination. (10a) The agreement (hereinafter referred to as the "Subordination Agreement") contains provisions for subordination of the Notes and payments thereon to the Senior Debt as therein defined and defines the extent of the subordination. (17a-18a)

The Senior Creditors also filed claims for the amount of the bankrupt's indebtedness to each of them, with interest thereon until the date of the filing of the petition. (36a-56a) Bankers Life moved for an order directing that after the Senior Creditors' claim, as filed in this proceeding, shall have been paid in full, the dividends allocable to Bankers Life's claim shall be paid to Bankers Life, on the ground that Section 63a(1) of the Bankruptcy Act precludes payment to the Senior Creditors of post-bankruptcy interest from dividends payable on the Notes. (1a) On the other hand, the Trustee in Bankruptcy and Manufacturers moved for an order providing that such dividends shall be payable to the Senior Creditors, until the principal amount of the obligation due to the Senior Creditors and interest thereon to the date of payment shall have been paid in full, as provided in the Subordination Agreement. (26a, 32a)

The Bankruptcy Court denied the Bankers Life motion and granted the Trustees' and Manufacturers' motion. (57a)

The District Court reversed the decision and order of the Bankruptcy Court (67a) on the ground that payment to the Senior Creditors of the dividends payable to Bankers Life is governed by Section 63a(1) of the Bankruptcy Act and that the Subordination Agreement's provisions that in the event of Bankruptcy "all principal and interest on all Senior Debt shall first be paid in full before any payment on account of principal and interest is made upon the subordinated Notes and that amounts payable to the junior creditors shall be paid directly to the Senior Creditors for application in payment of the Senior Debt "unless and until all principal and interest on all Senior Debt shall have been paid in full", does not entitle the Senior Creditors to receive dividends payable to Bankers Life for application to post-bankruptcy interest, in absence of explicit language to that effect in the Subordination Agreement.

ARGUMENT

POINT I

Section 63a(1) of the Bankruptcy Act and the general rule that interest stops on the date of the filing of the petition is to be suspended, applies only to debts which may be proved against the bankrupt estate.

Section 63a(1) of the Bankruptcy Act governs claims which may be proved and allowed against the bankrupt's estate. The relevant part thereof reads as follows:

§63. *Debts Which May Be Proved.* a. Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have

been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest.

The Senior Creditors filed their claims against the estate of the bankrupt, (claims 5, (36a-55a) 43, and 44 (56a) respectively) in the amounts of the principal debt due from the bankrupt to each of them as of the date of the filing of the bankruptcy petition, with interest thereon to said date.

The Senior Creditors filed such claims as general creditors of the bankrupt to enable them to receive their pro rata share of the bankrupt's assets distributable to all general creditors of the bankrupt. In accordance with the interest limitation provision of Section 63a(1) of the Bankruptcy Act applicable to claims of general creditors, these claims did not include, and the Senior Creditors do not claim against the bankrupt's estate, interest accruing after the filing of the petition for adjudication.

Bankers Life also filed a claim against the bankrupt's estate based on two notes evidencing the bankrupt's indebtedness to Bankers Life, which notes are subordinated to the claims of the Senior Creditors against the bankrupt. (10a, 11a)

The "well recognized policy considerations which hold for the cessation of interest accrual as of the date of filing the petition", to which the District Court refers in its opinion and the cases which it cites in support thereof also apply to claims of creditors against the bankrupt's estate.

The decisions in *Nicholas v. U.S.*, 384 U.S. 678 (1966) and *Columbia Aircraft v. U.S.*, 163 F. Supp. 932 (S.D.N.Y., 1958) (71a) show clearly that they deal with preclusion of the allowance of post-petition interest with respect to claims against the bankrupt's estate. Both deal with tax claims against the estate. In *Nicholas v. U.S.*, *supra*, it is stated at page 682:

"It is a well settled principle of American bankruptcy law that in case of ordinary bankruptcy the accumulation of interest on claims against the bankrupt estate is suspended as of the date the petition in bankruptcy is filed."

Vanston Bondholders Protective Committee v. Green, 329 U.S. 156 (1947) (71a) also relates to a claim against the estate. It is there stated at page 163:

"As a general rule after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claims against the funds."

Sexton v. Dreyfus, 219 U.S. 339 (1911) (71a) holds that while a secured creditor holding *insufficient* collateral to satisfy his claim against the bankrupt may apply interest and dividends payable on such collateral after the filing of the petition to the interest accruing after the filing thereof, he may not increase his claim against the bankrupt's estate for the deficiency, by first applying the proceeds of such collateral to interest accruing after the filing of the petition.

The discussion in Vol. 3A Collier, Bankruptcy ¶ 63.16[1] at 1855 *et seq.* (14 ed. 1972) (71a) also deals with claims against the estate. It is stated therein that although "a secured creditor whose security was insufficient to cover both capital and interest may not increase his deficiency claim by applying the proceeds first against interest accrued after the filing date [p. 1861] * * * payment of interest accruing after the date of petition is permitted where the collateral is sufficient, for 'the collateral is security for the payment of interest as much as the payment of the principal'" (p. 1862).

POINT II

The claims of the Senior Creditors which arose out of the Subordination Agreement are not claims against the estate but are claims against the Appellee, the subordinating creditor, which are governed solely by the Subordination Agreement.

As has heretofore been shown, Section 63a(1) of the Bankruptcy Act and the general rule for cessation of interest as of the date of the filing of the petition are applicable to situations which affect all creditors and relate to the distribution of the bankrupt's assets to such creditors. They do not relate to claims of one or a group of creditors to receive the dividends allocable to another creditor or group of creditors by reason of a consensual subordination agreement. The rights of the senior and junior creditors with respect to such dividends arise out of and are defined in the Subordination Agreement.

Subordination agreements have been traditionally recognized and enforced by the bankruptcy courts for decades.¹ The Bankruptcy Court does not realign the rights of the senior and subordinating creditors "but serves only as a forum for recognition of rights already acquired,"² and [b] "by its adjustment of the order of payment the bankruptcy court conformed the distribution of the estate to accord with the rights of the parties, as such rights were fixed by

1. Coogan Hogan & Vagts, Secured transactions under U.C.C., page 2352; *In re Credit Industrial Corporation*, 366 Fed. 2d 402, 408 (2d Cir. 1966). While *In re Credit Industrial Corporation* does not deal specifically with the right of a senior creditor to post-petition interest, it enunciates the rules applicable to the enforcement of subordination agreements by the bankruptcy court and of the rights of senior creditors thereunder.

2. *In re Credit Industrial Corporation*, *supra*, at page 407.

their own contract"³. It has been held that subordination agreements have been enforced in bankruptcy proceedings "with the result that the dividends paid on the Subordinated Debt are allocated to the Senior Debt * * * despite the absence of any reference in the subordination agreement to bankruptcy proceedings"⁴.

The Subordination Agreement provides that in any insolvency proceeding any payment which may be payable in respect of the Notes on which the claim of Bankers Life is based, shall be paid to the holders of the Senior Debt due to them from the bankrupt for application in full payment of the Senior Debt and interest thereon to the date of payment. In claiming the dividends allocable to the Bankers Life claim, the Senior Creditors are not claiming their ratable part of the bankrupt's assets available for distribution or payable to the bankrupt's general creditors who filed their claims in this proceeding, but claim the bankrupt's assets which are payable on the Bankers Life claim, as equitable assignees of the dividends payable to Bankers Life.⁵

3. *Bird & Sons Corp. v. Tobin*, 78 Fed. 2d 371 p. 373 (8th Cir. 1935).

4. *First National Bank of Hollywood v. American Foam Rubber Corporation*, 306 F. Supp. 593 (S.D.N.Y. Cooper D.J. 1960) at 601-602.

5. "By subordinating their notes the noteholders made an equitable assignment to the unsubordinated creditors of their right to participate in the assets to the extent they are required to pay the claims of the unsecured creditors." *In re Alda Commercial Corporation*, 300 F. Supp. 294, 296 (S.D.N.Y. Bonsal D.J. 1969).

POINT III

The Third Circuit and the District Court erred in failing to distinguish between a claim against the estate of the bankrupt and the claim of Senior Creditors to the dividends allocable to the claim of the junior creditor and consequently in holding that Section 63a(1) of the Bankruptcy Act is applicable to the latter claim.

The District Court reversed the decision of Bankruptcy Court in reliance on the decision of the Third Circuit in *In re Time Sales Finance Corp.*, 491 Fed. 2d 841 (3d Cir. 1974).

In that case Judge Adams stated at p. 845:

"[w]hen we are confronted with an instrument that satisfactorily indicates that subordinated creditors were put on notice that superior creditors may be entitled to interest up to the date of actual distribution . . . we may then be called upon to determine whether the language of section 63a(1) and the policies underpinning the Bankruptcy Act permit the payment of post-petition interest from the bankrupt's estate where some of the creditors have agreed to subordinate their claims against the bankrupt to those of other creditors."

The District Court approved and quoted the following statements of Judge Adams in the *Time Sales* decision:

"If a creditor desires to establish a right to post-petition interest and concomitant reduction in the dividends due to the subordinated creditors, the agreement should clearly show that the general rule that interest stops on the date of the filing of the petition is to be suspended, at least vis-a-vis these parties." (p. 844), (73a)

The District Court then stated:

"Upon the standard established in *Time Sales*, precise, explicit and unambiguous language must be contained in the subordination agreement to the effect that the contract abrogates the general rule regarding interest, in order that a right to 'post-petition' interest prior to the payment of dividends to junior creditors may be established." (74a)

Neither the statutory law nor the decisions and authority on which the Third Circuit and the District Court rely support their conclusion that Section 63a(1) of the Bankruptcy Act and the general rule of cessation of interest on claims against the bankrupt as of the date of the filing of the bankruptcy petition applies to the claims of the Senior Creditors vis-a-vis Bankers Life. The Bankers Life claim does not ask for post-petition interest. The dividends on that claim are initially payable to Bankers Life but they are allocable and payable to the Senior Creditors as Bankers Life's alter ego and are applicable to the Senior Debt as provided in the Subordination Agreement.

As appellants demonstrated in Point I hereof, a plain reading of Section 63a(1) of the Bankruptcy Act evidences that that section is applicable to the amount of interest to be included in claims filed by the Senior Creditors to enable them to share in the distribution of the bankrupt's assets to all general creditors and not their claims for interest out of dividends allocable to Bankers Life and that the decisions on which the Third Circuit and the District Court rely deal with distributions allocable to claims filed against the bankrupt and his estate and not as here, with claims of one creditor to distributions allocable to another creditor, pursuant to such other creditor's agreement.

It therefore follows that the District Court to the contrary notwithstanding, the Bankruptcy Court correctly enunciated the law applicable to the instant case when it stated "Section 63a(1) of the Bankruptcy Act does not determine the interest controversy." (61a)

POINT IV

Inasmuch as Section 63a(1) of the Bankruptcy Act is inapplicable to the Senior Creditors' claims against Bankers Life it was not necessary to refer thereto in the Subordination Agreement, which clearly and explicitly provides for payment to Senior Creditors of dividends allocable to the claim of Bankers Life until the principal and interest due on the Senior Debt shall have been paid in full.

The Subordination Agreement before this Court is broader and more explicit than the agreement in *Time Sales, supra*. The *Time Sales* agreement provides similarly to the Subordination Agreement that in the event of bankruptcy, the principal and interest owing on the superior indebtedness shall be paid in full before any payment is made on the subordinated notes. The Subordination Agreement provides further that in any such proceeding "any payment or distribution of any kind of character, whether in cash, property, stock or obligation which may be payable or deliverable in respect of the Notes, shall be paid or delivered directly to the holders of Senior Debt for application in payment thereof unless and until principal and interest on all Senior Debt shall have been paid in full". (17a-18a)

The District Court states that "precise, explicit and unambiguous language must be contained in the subordination agreement to the effect that the contract abrogates the general rule regarding interest in order that a right 'to post-petition' interest prior to the payment of dividends to junior creditors may be established". (74a) That statement presupposes that the rule that interest stops on the date of the filing of the petition is applicable to the claims of the Senior Creditors vis-a-vis Bankers Life, and appel-

lants have heretofore demonstrated that that is not the case. The inapplicability of that general rule also disposes of the District Court's finding that the language contained in the Subordination Agreement "is not of such nature as would preclude an interpretation of 'interest' as employed therein so as to mean such interest as is usually allowable in a bankruptcy proceeding, that the general rule regarding interest would not be applied." (74a) The appellants found no reported case decided prior to *Time Sales* wherein any court stated or suggested that "interest" in a subordination agreement could or would be so construed or understood.

The Subordination Agreement is an agreement between the Senior Creditors and Bankers Life, pursuant to which Bankers Life made its loan to the bankrupt. Its unambiguous language leaves no room for any interpretation or construction other than that the Senior Creditors have an absolute right to receive the dividends allocable to the Bankers Life claim based on the subordinated Notes, until the Senior Creditors shall have received the principal amount of the Senior Debt and interest thereon until the date of payment, be such date prior or after the filing of the bankruptcy petition. It is inconceivable that the provision that in the event of bankruptcy the dividends payable on Bankers Life's claim shall be paid to the Senior Creditors until principal and interest on all Senior Debt shall have been paid in full could be understood or construed to mean "but not on interest accruing on the Senior Debt after the filing of the petition". Had Bankers Life, a sophisticated lender, wished not to subordinate its dividends in this fashion it should and would have limited its subordination to principal and pre-petition interest by language to that effect. As stated by the Bankruptcy Court "the subordination agreement . . . clearly demonstrates that Bankers Life Corporation had in mind precisely the situation now before the Court". (62a-63a)

POINT V

The Decision and Order of the District Court should be Reversed and the Subordination Agreement should be enforced in accordance with the Decision and Order of the Bankruptcy Court.

The prior discussion herein amply demonstrates that it was not the Bankruptcy Court but the Third Circuit and the District Court which misconceived the thrust of "the relevant decisional authority" (72a) and that the District Court erred in following the *Time Sales* decision in holding that the rule enunciated by the Third Circuit is one of "explicitness" requiring the Subordination Agreement to clearly show the suspension of the general rule that interest stops on the date of the filing of the petition.

The District Court does not challenge the validity of the Subordination Agreement. It agrees that the "bankruptcy court, in order to effectuate its duty to do equity, must enforce lawful subordination agreements according to their terms and prevent junior creditors from receiving funds where they have 'explicitly agreed not to accept them'". *In re Credit Industrial Corp.*, *supra*, at page 410 (71a).

Junior creditors agree to subordinate their claims to senior creditors because financing agreements pursuant to which loans are made by the senior creditors to the common debtor forbid unsubordinated loans.

In *United States v. Bass*, 271 Fed. 2d 129, cited by the Third Circuit and the District Court, the Court quotes from *United States v. Harrington*, 269 Fed. 2d 719 (4th Circuit 1969) at p. 131 ". . . when a creditor extended credit, he relied upon the particular security given as collateral to secure both the principal of the debt and interest until payment and, if the collateral is sufficient to pay him the contract between the parties ought not be abrogated by bank-

ruptcy", and then states at page 132 that post-bankruptcy interest is allowed to creditors who "are deemed to have bargained for collateral to secure not only the principal obligation, but interest thereon as well."

Subordination creates a kind of security⁶ and the Senior Creditors bargained for and looked to the dividends allocable to Bankers Life as security for payment of interest to the date of payment as much as for the payment of principal. The Senior Creditors were aware that the liquidation of large bankruptcy estates may take considerable time. They, rather than Bankers Life, bargained for compensation for any economic loss resulting from the delay in the liquidation of the bankrupt's estate and they should not be denied that compensation by a misapplication of a post-bankruptcy interest rule relating to proofs of claims against the estate.

Here, even as in *In re Credit Industrial Corp.*, *supra*, "although the court attempted to achieve an equitable result, the rule it enunciated actually is inequitable with respect to senior creditors".⁷

In its brief below, Bankers Life referred to the language in the Subordination Agreement as "boilerplate," and thus concedes that this language is widely used in subordination agreements. The interpretation of subordination agreements suggested by the Third Circuit and the District Court would affect "literally billions of dollars of loans" made

6. Coogan Hogan & Vagts, Secured transactions under U.C.C., page 2357, f.n. 27, "While the word 'subordinate' suggests a mere ranking or priority, upon the insolvency of the common debtor the amounts otherwise payable on the junior creditor's claim will in the usual subordination situation be payable to the senior creditor. Thus, it is argued that from an economic standpoint a subordination creates a kind of 'security' or 'cushion' for the senior debt. See *Calligar*, *supra* Note 18, 378."

7. *In re Credit Industrial Corp.*, *supra*, at p. 410.

by lending institutions who are senior creditors pursuant to the terms of subordination agreements containing this "boilerplate" language.

Lending institutions should not be deprived of the right to enforce existing subordination agreements providing for their receipt of dividends allocable to the subordinating junior creditors' claim until they shall have received payment of the principal obligation and interest thereon until the date of payment.

Conclusion

For the reasons stated, the decision and order of the District Court should be reversed and the order of the Bankruptcy Court should be reinstated.

Respectfully submitted,

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a Brief & Appender
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